

# **Is the Principle of Sovereignty Influenced by Global Environmental Challenges?**

Particular Emphasis on Climate Change and the Law of the Sea

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## **Abbreviations**

BAT	Best available techniques
BEP	Best environmental practice
COP	Conference of the Parties
EU	European Union
PCIJ	Permanent Court of International Justice
ICJ	International Court of Justice
ICJ	Rep. International Court of Justice Reports
ILC	International Law Commission
ILM	International Legal Materials
IPCC	The International Panel on Climate Change
ITLOS	International Tribunal for the Law of the Sea
MEA	Multilateral Environmental Agreement
MOP	Meeting of the Parties
NGO	Non-Governmental Organisation
RIAA	Reports of International Arbitration Awards
UN	United Nations
UN Doc.	United Nations Documents
UNCLOS	United Nations Convention on the Law of the Sea 1982
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
WTO	World Trade Organisation

# 1 Introduction

## 1.1 Problem for discussion

Environmental issues cause problems for other states than the source nation. This opposes the fundamental order of public international law, based on a strong nation-state and the jurisdiction within its borders. Clearly, effective legal protection of the environment calls for international legal regulation. One major obstacle for providing extensive and effective international legal regimes, thus ensuring a more sound policy in this area, is namely a strong principle of sovereignty. The purpose of this paper is to try to detect any recent developments in the concept of state sovereignty, resulting from the influence of international environmental law.

The problem for discussion, more accurately, is whether the principle of sovereignty is influenced by our global environmental challenges. The problems discussed here have been derived from a broader perspective; to what extent international environmental law is influencing the principles and character of international law generally. Indeed, this approach is imperative, as traditional international law alone has shown an inadequacy in meeting the challenges of global environmental protection.

One might see the nexus at hand simply as a competing relationship. However, the principle of sovereignty in international environmental law gives rise to obligations as well as rights. As a result, a change in the principle can have consequences in both directions.

The environment is a field where the clash of opposing sovereignties has become most evident and most difficult.<sup>1</sup> This has led to a view of conventional international law as

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<sup>1</sup> This has been materialized by the increasing number of environmental-related disputes before international tribunals.

inadequate in handling this area, especially by the lack of binding force in the law-making process, as well as the lack of compliance among sovereign states.

## 1.2 Actuality and background

Environmental problems are now widely perceived as one of the great concerns of mankind. Alarming reports from different sources are now making the headlines and the predicament more critical than ever. Evidently, environmental issues are of immense actuality, especially with creeping concerns such as the climate change.

International environmental law is now facing a wider problem, namely, environmental problems of global relevance. This calls for a different approach in the development of treaties and obligations. The difference with treaties for the protection of areas beyond national sovereignty on the one hand and the treaties dealing with global environmental problems on the other hand, is twofold. The latter oblige states to become active in their own territories thus causing a substantial intervention into state sovereignty, whereas the former require acts or omissions outside of the state territory and infringe to a lesser degree upon sovereignty.<sup>2</sup>

At present, the legal regimes in international law seem outdistanced by problems caused by environmental degradation, despite the efforts being made by the international community. International environmental law is no longer confined to national boundaries and is not only transboundary, continental and regional, but is seen as having global dimensions. In answer to this challenge, the international community has built, and increasingly will, build environmental global regimes to face this development. A state-oriented view in international law is, and has been for a while, challenged by a more dynamic view.

The condition under which sovereignty is exercised has changed considerably since 1945. Many new states have entered the international arena, with the UN being an important catalyst. International law was prior to World War II to a large extent based upon individualism, while today's international law has developed into a socially

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<sup>2</sup> See J. Wolfram "Purposes and Principles of International Environmental Law" (1990) p. 327.

oriented international law. This development has set many constraints on what states can do, and not only in the realm of human rights.<sup>3</sup> The concept of international environmental law has created new obligations in relation to the way states treat their own territory and resources.<sup>4</sup> In addition, many new participants are playing roles internationally which previously were more or less exclusively played by states.<sup>5</sup>

This being said, sovereignty still is one of the cornerstones in international law. It is strongly arguable that the principle of sovereignty ensures that the benefits of the internationalization of trade, investment, technology and communication will be equitably shared. The justification of state sovereignty does not include any claim of unrestrained power of a state to do whatever it may find suitable. It is acknowledged that sovereignty implies a dual right and a dual responsibility; within a state a sovereign power makes law with the assertion that this law is supreme and ultimate, that its validity doesn't depend on the will of any other authority. Externally, a sovereign power obeys no other authority.<sup>6</sup> This is accompanied by the responsibility to respect the dignity and basic rights of all the people within the state, and externally to respect the sovereignty of other states. In this regard, sovereignty has become a foundation for good international citizenship.

### 1.3 Definitions and delimitations

The problem for discussion has a rather wide impact area. It could apply to almost every field of international environmental law. This requires accurate delimitations, in two regards. First of all, it enables one to capture relevant influences, and secondly to be able to penetrate the material in concern. However, the problem for discussion needs to call upon general developments which influence the traditional order of the principle of sovereignty. This forces the introduction to form a general and wide background on some fundamental issues in international law. This will hopefully later increase the understanding of climate change and the law of the sea. I will also discuss relevant case

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<sup>3</sup> The area of human rights may be viewed as the area which has been most developed in this context.

<sup>4</sup> Environmental concerns as ozone depletion, global warming and extinction of species influences the world at large.

<sup>5</sup> A good example is the United Nations.

<sup>6</sup> See Walker "Sovereignty in Transition", p. 116.



law, state responsibility and the role of principles in international environmental law. Some general conclusions and reflections will be addressed at the end.

As the title indicates, there are two main areas that need to be defined, namely sovereignty and the core of global environmental problems. These limitations need to be drawn in coherence with each other.

With global environmental problems I will try to focus on those which may have the closest connection with the principle of sovereignty. Here, the main focus will be directed towards climate change and the law of the sea, especially in connection with treaty law. Sovereignty is being challenged in other areas of international law as well, e.g. human rights,<sup>7</sup> intervention and trade law. Although interesting links with environmental problems can be drawn here, especially since these areas have been developed further than environmental problems in this context, such links will fall outside the scope of this paper.

The European Union<sup>8</sup> is also an interesting concept both in relation to environmental law and sovereignty. It has developed into an autonomous system that functions largely outside the realm of traditional international law. The EU represents the most advanced and maybe only form of this vague suprapolity. Accordingly, a special kind of sovereignty has emerged from this process. However since this may be seen as an unusual idea in the traditional concept of international law regarding sovereignty, I will mostly steer clear of it. I will apply my findings upon traditional international law, within the realm of individual sovereign states, as a platform for the problem for discussion.

### 1.3.1 Sovereignty

To search for possible changes in the principle of sovereignty it is evidently important to define the substance of the principle.

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<sup>7</sup> The ongoing discussion/development on the right to a healthy environment could for example profitably have been brought to attention.

<sup>8</sup> Hereafter the EU.

Under international law, states are sovereign and have duties and rights as a consequence. Sovereignty is a concept which provides order, stability and predictability in international relations since sovereign states are regarded as equal, regardless of comparative size or wealth.

According to the doctrine of sovereignty prevailing in the nineteenth and better part of the twentieth century, states were only bound by those rules of law to which they had agreed, either by conclusion of treaties or through customs. There existed a presumption in favour of “unrestrained sovereignty”. The Permanent Court of International Justice held in the Lotus Case that “restrictions upon the independence of States cannot ... be presumed”.<sup>9</sup> The old view according to the Harmon doctrine was that a state has the right to use its territory in whatever way it deems suitable, even if such utilization could cause environmental harm beyond its borders.<sup>10</sup> The competing principle was territorial integrity where a state is entitled to be free of infringements upon its territory.

More recent definitions paint a more nuanced picture, but still give the principle of sovereignty a strong foundation. The doctrine of the sovereignty and equality of states has three principle corollaries.<sup>11</sup> Namely, states have: firstly, a jurisdiction, *prima facie* exclusive, over a territory and a permanent population living there; secondly, a duty of non-intervention in the area of exclusive jurisdiction of other states; and thirdly, the dependence of obligations arising from customary law and treaties on the consent of the obligor.<sup>12</sup>

Another way of viewing it is sovereignty as freedom of outer binding factors, and international law as being the only source of such competence. However, with such an approach, every obligation could possibly be viewed as influencing sovereignty.

For illustrational purposes, each state may be said to have its own sovereignty-sphere. This sphere is as a starting point only influenced by the rules they have accepted themselves. This means that states initially are not bound by a higher legislator or

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<sup>9</sup> See Lotus Judgement, PCIJ, Series A No.10, 1927, p. 18.

<sup>10</sup> The doctrine was expressed by Judson Harmon, Attorney General of the United States, in 1895.

<sup>11</sup> The legal principles of equality and sovereignty are interconnected in the UN Charter Article 2(1) “sovereign equality”.

<sup>12</sup> Ian Brownlie, “Principles of public International law” (4<sup>th</sup> edn), p. 287.

judicial power. However, there are some significant modifications; states are independent from other states within the frame of international law. States can freely give away some of their power under the existing rules of international law, e.g. to majority verdict, see UN Pact 108. There are influences to this sovereignty-sphere which calls for attention.

Globalization and the development of the principle have intensified the criticisms of the nature of international law as state law. These critiques have often sought to project a material value, or an idea of social justice outside of statehood, that should be enforced by international law.<sup>13</sup> Ecological interdependence has undoubtedly complicated inter-sovereign law by the evolving environmental challenges. One of our biggest challenges might be the fact that each state, to a large degree, can use its own resources in a manner which evidently threatens our common resources.

### 1.3.2 Global Environmental Challenges

First of all, global challenges imply a limitation against more regional or national environmental problems. However these lines are thin, as the complete impact of the different environmental problems is hard to predict. Typical areas are the atmosphere and the oceans and seas. Within the atmosphere lies ozone depletion, transboundary air pollution, outer space and climate change. Regarding oceans and seas, a number of different sources of pollution affect the global environment, e.g. pollution from land-based sources, vessels and seabed activities. Also, depletion of shared resources such as migratory wildlife and freshwater may threaten environmental quality and jeopardize economic prosperity and human welfare. All of these issues have a global impact and obviously create huge challenges. And they can all be identified by their universal character. However, with the problem for the discussion in mind, I will have to make a selection. And global problems concerning the marine environment and climate change will stand in the centre of my attention. The intention is however not, even in these areas, to examine everything which might influence the principle of sovereignty, but rather to pinpoint significant developments.

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<sup>13</sup> Koskenniemi, (1994) pp. 22-29.

It would also avail the problem at hand to define “the environment” in general. The attempts at defining what constitutes the environment vary through time. Many treaties on this subject don’t even define it, e.g. the United Nations Convention on the Law of the Sea.<sup>14</sup> However, it will be sufficient in this paper to refer to what has been defined in treaties and other international acts. Here, the environment includes four possible elements: firstly, it includes fauna, flora, soil, water and climatic factors; secondly, material assets; thirdly, the landscape and environmental amenity; and fourthly, the interrelationship between the above-mentioned factors.<sup>15</sup> The global challenges I will address typically fall under the first category.

#### 1.4 International legal norms

With our problem for discussion in mind, an interesting notion with international law is to analyze whether it can withstand the challenges posed by the sovereignty principle. To examine whether international law is dynamic, one has to address how it develops, namely through its sources.

In the *S.S Lotus* case, relating to sovereignty, the Permanent Court of International Justice stated: “In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”<sup>16</sup> This can be seen as a starting point, or a frame, for considering what restrictions the traditional principle of state sovereignty places upon international law.

International environmental law is, in a certain sense, a special field of international law and there is little doubt that international law, including environmental law, has evolved from a theoretic to a more practical and dynamic concept. This development comes partly as a result of the exponential growth in international organizations and treaty-making, but also important decisions from international tribunals have played their role. In addition, the dynamic nature of international law plays a part. This means that the principle of sovereignty can be subject to change.

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<sup>14</sup> Hereafter UNCLOS.

<sup>15</sup> Philippe Sands, “Principles of International Environmental Law”, (2003) pp. 15-18.

<sup>16</sup> Judgment of PCIJ 7.9.1927, The case of the *S.S. Lotus*, p. 19.

The law-making process in international environmental law has different kinds of problems. One is the relative slowness in the process of making new rules, both in treaties and in the development of customary international law. Although there are exceptions, this slowness is still a cause for concern,<sup>17</sup> especially when the problem of making precise and effective agreements is taken into consideration. A second problem is the emphasis on the independent sovereignty of states, which is the scope of this paper. These two problems are clearly interrelated, and can hardly be solved independently.

It is also worth mentioning that the law-making process in the field of the environment is fragmented. There is little progress to unite the different fields; each problem is typically being solved by itself. This leaves a fragmented and complex area behind. This partly explains why there are hundreds of treaties in the field of international environmental law.

Public international law primarily governs the relations between states. It is now widely perceived that states are not the only subjects of international law, and that the rules of international law can, and do, impose obligations upon the other members of the international community, in particular international organizations and also to lesser degree non-state actors, including individuals and corporations.<sup>18</sup>

#### 1.4.1 Sources of international law

There is no international legislature; however, there are generally accepted sources from which international law derives. The foundation of the sources in international law is the classic Article 38(1) of the Statute of the International Court of Justice.<sup>19</sup> Strictly interpreted it can only be said to apply to the ICJ, but there is general agreement that it expresses the sources of international law. The three main sources are treaties, customs and principles of international law.

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<sup>17</sup> E.g. the Vienna Convention for the Protection of the Ozone Layer of 1985 was signed within a year after the discovery of the problem.

<sup>18</sup> Philippe Sands, "Principles of International Environmental Law" (2003), p. 124.

<sup>19</sup> Hereafter ICJ.

In the field of international environmental law, the most commonly used or the most important source has been treaties. *Litra a* refers to “international conventions whether general or particular, establishing rules expressly recognised by the contesting states.” An immense production has been created in this area, both regarding the amount and the extent of rules. The essence of customary international law according to Article 38 *litra b* is that it should constitute “evidence of a general practice accepted as law”. The substance of customary law must be “looked for primarily in the actual practice and *opinio juris* of states”.<sup>20</sup> Customary law has contributed its fair share to international environmental law, a good example being in the field of state responsibility.

*Litra c* speaks of general principles of law recognised by civilised nations. An exact or agreed interpretation of the wording is hard to find. The rationale is; in the lack of a convention or custom, the court could rely on general principles.<sup>21</sup> However, it must be stressed that the principle of sovereignty can exert its influence here.<sup>22</sup> In general, *litra c* refers to those common principles that emerge from different domestic legal systems, and then are used to define rules applicable on the field of international law, for example procedural rules. Certain general principles of international law have, however, played an important role in environmental law, e.g. the principle of good neighbourliness. It is valuable here to notice that the environmental legal principles that have been laid down in the 1972 Stockholm Declaration on the Human Environment and the 1992 Rio Declaration on Environment and Development,<sup>23</sup> cannot simply be seen as being a part of *litra c* in Article 38. To reach hard law, these principles as a rule have to be accompanied by a treaty or develop into of customary international law.

Among subsidiary sources of international law, judicial decisions have had the most important function. The ICJ and other tribunals have often played an innovatory and imperative role in international law.<sup>24</sup> They can however formally never make new law, only apply and identify it.

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<sup>20</sup>Libya and Malta Continental Shelf Case, ICJ Rep. 1985 p.13.

<sup>21</sup> See Morten Ruud/Geir Ulfstein “Innføring I Folkerett”, page 58.

<sup>22</sup> A similar thought expressed through the “Legality of the Threat or use of Nuclear Weapons Case”, ICJ Reports 1996.

<sup>23</sup> UN Doc. A/CONF. 48/14/REV. 1 (1972) and UN Doc. A/CONF.151/26/Rev. 1/Vol. I (1992).

<sup>24</sup> See e.g. Trail Smelter and Gabčíkovo-Nagymaros cases referred to later in the paper.

However, the sources of international environmental law are perhaps more nuanced in the list proposed by the International Law Commission in 1989.<sup>25</sup> In addition to the ones mentioned in Article 38 are binding decisions of international organisations, and judgments of international courts or tribunals. The combination of general principles of law and judicial decisions has already proved itself as influential, but its full potential as a drive for environmental protection is still unrevealed.

#### 1.4.2 Soft law - a special feature in international environmental law

Soft law also plays an important role in the development of international environmental law. One definition is the “production by states of numerous forms of non-binding declarations and guidelines and non-binding sets of rules and standards”.<sup>26</sup> Such instruments are produced in formal circumstances, for instance as the final product of conferences, or even within the framework of binding treaties or conventions. As it is formally non-binding, it’s easier for states to consent to soft law. That is one of the reasons why it is widely used in this area of international law. Accordingly, it is more an aspiration or a desirable goal, than a true commitment. And politically it can be used as an aim to score points.

However, soft law may be a valuable starting-point for issues that are premature for hard law. It can also stimulate state-practice and form a basis for *opinio juris*, which is needed to form customary international law. Soft law shows time and again that it points to the likely future direction of legally binding obligations, by informally creating acceptable norms of behaviour, for instance the Universal Declaration of Human Rights. It started with the formulation of a series of aspirations, but as time went on these aspirations became firmer and they have become part of accepted international law. Not only have these aspirations been manifested through binding texts such as the European Convention on Human Rights, but also through international customary law. International environmental law can in many ways be seen as following in the footsteps of human rights, and similar tendencies may evolve here.

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<sup>25</sup> Hereafter ILC.

<sup>26</sup> The definition is from M.A. Fitzmaurice in the article “International Environmental Law as a Special Field”.

To what extent the principle of sovereignty is influenced by developments in international environmental law may therefore depend on the legal status of the obligation, whether it is non-binding political soft law, or legally binding hard law. This applies at least in a short perspective.

#### 1.4.3 The global environment and *erga omnes*

An interesting concept in international law which influences the role of states is the concept of *erga omnes*. Traditional international law is concerned with legal obligations owed to another state, which can be enforced by the affected state. As opposed to this, obligations owed to the whole international community of states, can be enforced by or on behalf of the community, so-called obligations *erga omnes*.<sup>27</sup> *Erga omnes* is referred to by the ILC in the Draft Articles on State Responsibility.<sup>28</sup> Article 48 (1) (b) of the Draft Articles declares that any state may bring an international claim in respect of the breach of an obligation owed to the international community of states as whole. In the dissenting opinion of Judge Weeramantry in the Gabcikovo-Nagymaros Dam Case, sustainable development is seen as an *erga omnes* obligation.<sup>29</sup> The implication of such a statement is hard to predict. Legally, an ICJ case is only binding for the two parties concerned.<sup>30</sup>

The concept of obligations *erga omnes* could in the future be of increased relevance when global environmental problems are at issue. Global environmental problems fit the universality of the concept quite nicely. *Erga omnes* can override sovereignty by compelling states to implement these obligations when national jurisdiction is exercised. Problems such as depletion of the ozone layer, the extinction of the world's biodiversity, the pollution of international waters, and the threat of climate change are all within this scope. The world's climate and biodiversity were identified as a common concern of mankind in the Conventions on Climate Change and Biodiversity. These

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<sup>27</sup> See e.g. Barcelona Traction case between Belgium and Spain where the court held that "an essential distinction should be drawn between obligations of a state towards the international community as a whole, and those arising vis-à-vis another State." Pointing out that the former is the concern of all states.

<sup>28</sup> The draft articles were adopted by the ILC at its fifty-third session, held in 2001.

<sup>29</sup> The Gabcikovo-Nagymaros Dam Case ICJ Reports 1997, between Hungary and Slovakia.

<sup>30</sup> See Article 59 of the Statute of the ICJ.



concepts and the principle of the Common Heritage of Mankind in UNCLOS all point to the emergence of environmental duties to the international community as a whole.<sup>31</sup>

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<sup>31</sup> United Nations Convention on the Law of the Sea, see Article 136.

## 2 Treaties

### 2.1 Treaty regimes as special sectoral legal systems

Sovereign states have the privilege of entering into treaties or conventions<sup>32</sup> with other sovereign states. And treaties do not *ipso facto* bind third states. These two basic rules underlie all treaty law. This means that if a state is not willing to commit itself, a majority of states cannot force a country to submit to a convention.<sup>33</sup>

Treaties are now the most common technique used to create binding rules concerning international environmental law. This trend accelerated noticeably after the attention given by the international community subsequent to the Stockholm Declaration in 1972.

The concept “treaty” is defined in the 1969 Vienna Convention on the Law of the Treaties as “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its designation”.<sup>34</sup>

While it is not possible in this paper to provide a detailed account of the hundreds of environmental treaties or declarations, it would be fruitful to point out significant developments which influence sovereignty. Recent environmental treaties constitute special regimes, compared to traditional international law. The foundations can be said to lie within conventional international law, but the difference lies in the development of autonomous bodies within the convention.

Initially, this can hardly be seen as a limitation of the principle of sovereignty, but the confrontation lies in the creation of lawmaking bodies within the convention. It must be

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<sup>32</sup> The term used is not decisive, through time numerous expressions have been used.

<sup>33</sup> If the state however, through its pollution, causes considerable harm to another state, it can be held responsible in international law.

<sup>34</sup> 23 May 1969, in force 27 January 1980.

stressed that participating parties have the sovereign discretion to initially enter into the treaty concerned. And, generally, they can choose to opt out, so good arguments can be made in favour of a strong principle of sovereignty relating to treaty law. However, the interesting substance lies in the nuance, in other words; in the periphery of the principle of sovereignty.<sup>35</sup> The problem for discussion calls upon influences, not paradigm-changes. And in this periphery<sup>36</sup> lies for example binding rules which are made by bodies outside the control of the concerned state, or compliance mechanisms outside the control of states. Political pressure can also be applied from the international society, “forcing” states to comply.

Today, many treaties use a framework approach. They have largely superseded the fully codified convention of the kind mostly pursued in e.g. UNCLOS. The framework approach simplifies the amendment procedure. It enables the treaty to contain general principles and set forth the organizational structure of the treaty bodies. Further protocols or annexes embody specific standards and are generally subject to a more flexible amendment process. A good example is the United Nations Framework Convention on Climate Change,<sup>37</sup> now accompanied by the Kyoto Protocol.

Another tendency in environmental treaty law is to provide an institutional mechanism for their implementation. A common arrangement is to provide for regular meeting of the parties, also called the Conference of the Parties.<sup>38</sup> A number of subsidiary committees report to the COP. This is sought to give a dynamic force to environmental treaties to respond to physical change in the environment. This is typically done by a scientific committee which reports to the COP. These tendencies are notable, as a lot of focus is put on co-operation in the negotiating process.

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<sup>35</sup> Human rights can be viewed as changing the very core of the principle of sovereignty, and is currently now more than a mere influence.

<sup>36</sup> The use of the word periphery cannot be interpreted as meaning the influences are unimportant. It is chosen to respect the fact that states have the sovereign right to initially be bound by treaty law, e.g. the USA and its relation to the Kyoto Protocol.

<sup>37</sup> Hereafter the UNFCCC, discussed under section 2.2 and below.

<sup>38</sup> Hereafter COP, for further details see section 2.2.2. Not to be mixed with the less common “meeting of the parties” (MOP).

Two milestones of the field of international environmental were the Stockholm<sup>39</sup> and the Rio Declarations. The hard law contribution to international law after the Rio conference limited itself to two conventions; Convention on Biological Diversity<sup>40</sup> and Framework Convention on Climate Change. UNEP was involved in the drafting of UNFCCC, together with other international organizations and bodies and on the development of the Convention on Biological Diversity. Despite UNEP's influence on international environmental law, it can only advise and persuade states to adhere to UNEP-sponsored instruments. This is quite interesting with the problem for discussion in mind.<sup>41</sup> Only the latter treaty will be dealt with thoroughly. However, there are a couple of points to be made on the former Convention.

This convention gives an interesting light on the principle of sovereignty in the field of international environmental law. Most of its articles start with “as far as possible and as appropriate”. As a result, the Convention appears vague and toothless. The wording also gives the impression that states can easily justify a potential breach. To support this impression, Article 3 states quite clearly that:

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

On the other hand, the Convention establishes some obligations constraining the exercise of national sovereignty. In particular this is present in Articles 5-10.<sup>42</sup> This illustrates the potential clash between the principle of sovereignty and environmental protection quite clearly, as well as the problem of constructing precise rules with a wide scope in international environmental law.

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<sup>39</sup> The Stockholm declaration was accompanied by 109 recommendations. In December 1972, the General Assembly endorsed the recommendations and created the U.N. Environment Programme (UNEP) to carry them out. UNEP-sponsored treaties include the regional sea conventions, Vienna Convention for the Protection of the Ozone Layer, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

<sup>40</sup> Hereafter CBD.

<sup>41</sup> It may serve as an example of the general lack of interest by states to freely give away jurisdiction in this field.

<sup>42</sup> See Birnie & Boyle p. 576 for a more details.

## 2.2 Framework Convention on Climate Change

### 2.2.1 Introduction

The Framework Convention on Climate Change is formed simply as a point of departure for further co-operation. As other framework conventions, e.g. the Convention on Long-Range Transboundary Air Pollution from 1979, the meaning is to fill the frame later with obligations through negotiations on, and adoptions of, protocols. As a result, the Convention doesn't contain many real commitments itself.

Average global temperature is predicted to rise between 1.4 to 5.8° C over the next 100 years.<sup>43</sup> This is the fastest rate of change since the end of the last ice age. With a warmer global surface, the global sea levels are expected to rise by 9-88 cm by 2100, and its consequences are evident. Other potential impacts are more extreme weather events, such as storms and heat waves. Simultaneously, the role of carbon sink means that deforestation, protection of ecosystems, sea-level rise, and sovereignty over natural resources are also vital.

The global dimension of climate change necessitates a wider approach to solve the problem, both by avoiding a sectoral approach as well as attracting states with totally different starting points. In addition to being global, the problem is also homogenous.<sup>44</sup> This imposes a moral duty upon all states to participate. Accordingly, the UNFCCC has massive support by states.<sup>45</sup> Simultaneously, concern arises when heavy polluters such as Australia and USA,<sup>46</sup> opt to stay out of the Kyoto Protocol. This can only be viewed as a set-back for the battle against climate change.

The economic magnitude of the problem causes major difficulties. This applies to almost all environmental protection, but in particular to climate change. The western world has to come to terms with the environmental policy, which has provided for most

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<sup>43</sup> Estimated by The Intergovernmental Panel on Climate Change (IPCC) in its Third Assessment Report: "Climate Change 2001: Synthesis Report".

<sup>44</sup> The concern is the total amount of emissions, not where the emissions take place. See Inge Grotli, "Felles gjennomføring og Den grønne utviklingsmekanismen", 2000 p. 169.

<sup>45</sup> For a detailed account of members and observers see [www.unfccc.int](http://www.unfccc.int).

<sup>46</sup> The Protocol was initially signed by President Clinton, but the Bush-administration withdrew the signature. This rarely happens in international relations and was interpreted as an action strongly opposing the Protocol.

of its prosperity and wealth. Concurrently, the developing world has to take environmental measures on its already troubled way. This has created the foundation for the principle of common but differentiated responsibility, which plays an important role in the obligations in the Kyoto Protocol. With regard to global environmental problems, the concept of common but differentiated responsibility has helped to mediate North-South disagreements by recognising states' different contribution to generating environmental problems and their different capacities resolving them.

A system established around a framework convention needs to be understood as a whole. Tidily, brick for brick is laid down, and each brick has its own role and is needed by and dependent on the rest. Accordingly, parts of these systems cannot be fully appreciated outside their framework. Important developments in the climate regime subsequent to the Convention are among others the Kyoto Protocol and decisions made by the Conference of the Parties, such as the Berlin Mandate (COP 1), the Buenos Aires Plan of Action (COP 4), and the Marrakech Accords (COP 7).

Things become more complicated, though, as the different areas within the regime enjoy a different degree of support by states. However, with the problem for discussion as the centre of this paper, I cannot apply a holistic approach to the climate regime. But the validity of the point remains.

### 2.2.2 Conference of the Parties

In Article 7 of the UNFCCC, the COP was established. It is intended to be a catalyst for the further development on the area. It is the highest body with authority to regularly review the compliance, and to respond to any lack of compliance with the measurements they have within their mandate.

In COP 1, a debate was launched with the aim to achieve more detailed commitments for the developed countries. This decision made is known as the Berlin Mandate. The result of these negotiations was the adoption of the Kyoto Protocol at COP 3 in Kyoto, Japan, in December 1997. The Conference of the Parties, under the climate regime, has proved itself to be an important factor in the development of substantial commitments.

### 2.2.3 Obligations under the UNFCCC

As stated above, the UNFCCC doesn't contain many commitments itself. However, I will make a couple of observations; all Parties to the Convention are subject to obligations listed in Article 4 §1 (a)-(j). Under this article, all Member States must prepare and regularly update national climate change mitigation and adaptation programmes. They must also include climate change considerations in their relevant social, economic and environmental policies, and use methods such as impact assessments to minimize adverse effects of climate change measures. In addition, all Parties must promote development, transfer and application of climate-friendly technologies and practices. The commitments undertaken in these subparagraphs are, however, very vague. Almost all of them state that the Parties undertake to "co-operate" or "promote" certain actions. The provisions under this article do not describe in further detail how such co-operation should be practiced.

All Parties must also submit reports including an inventory of their greenhouse gas emissions.<sup>47</sup> The Convention divides between Annex I and Annex II Parties. I will nevertheless not dig further here, as the Kyoto Protocol is of greater relevance for the problem for discussion.

### 2.2.4 Obligations under the Kyoto Protocol

The Kyoto Protocol offers regulation of a sensitive environmental issue finally addressing the vagueness which has traditionally dominated international environmental law. At the same time it tries to deal with another common concern for both regional and global multilateral treaties on the environmental field, namely, that the commitments are being undermined by inadequate implementation and enforcement by member states. The effort to pursue these problems has, to a certain extent, put heavy restraints on states.

The Kyoto Protocol can now be viewed as legally binding. It entered into force on 16 February 2005, as the requirements for its entry was eventually satisfied by Russia's

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<sup>47</sup> These reports are known as "national communications".

ratification. Moreover, the Protocol has, to a large extent,<sup>48</sup> unambiguous and clear wording.<sup>49</sup>

The core of the Kyoto Protocol is the legally binding emission targets for Annex I Parties, set forth in Article 3 § 1. Under this provision, the Parties commit to: “Reducing their overall emissions of ... [greenhouse] gases<sup>50</sup> by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.”

There is a duty for all Annex I Parties to show “demonstrable progress” by 2005.<sup>51</sup> With the Kyoto Protocol legally binding, this article functions as a warning of the commitments in period 2008 to 2012. It could be argued that this wording follows “the traditional” wording and function of international environmental soft law. As “demonstrable progress” now should have been achieved, it is interesting to see how states have responded. When it comes to Norway, the country can hardly be said to have shown “demonstrable progress”. From 1997, when the Protocol was negotiated, to 2005, the emissions have instead increased.<sup>52</sup> This will however not imply any serious consequences for Norway, which substantiates the soft law character.

Article 3 states the precautionary principle;<sup>53</sup> “The parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.” The precautionary principle is found in most of the major environmental law instruments, at least since 1992, and is now a vital part of the long-term protection of the environment. This is particularly important where the scientific uncertainty is apparent, which is quite normal in this field. This uncertainty cannot be used as an excuse for action or inaction due to the possibility of serious or irreversible damage by such action or inaction. The advance of scientific knowledge can exceed the parties’ mutual expectations.

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<sup>48</sup> See e.g. Article 3.

<sup>49</sup> In strong contrast with e.g. the cited “appropriate and as far as possible” wording in CBD.

<sup>50</sup> This contains the six most important greenhouse gases. Three of them, which are related to emissions from industrial processes, are subject for a choice of the year of basis by the states, 1990 or 1995.

<sup>51</sup> Article 3(2).

<sup>52</sup> Newly released figures by Statens Forurensningstilsyn (SFT) shows that in the period 1990-2003 the overall greenhouse gas emissions increased with 9%, whereas CO<sub>2</sub> alone saw an increase of 26%.

<sup>53</sup> The principle can perhaps be seen as having anchorage in customary international law, see the Gabčíkovo case.



An example of this can be found in a related area; within two years of signing of the Vienna Convention for the Protection of the Ozone Layer, the signatories issued the Helsinki Declaration on the Protection of the Ozone Layer, agreeing to phase out CFC gases earlier than proposed by the initial Convention. Scientific development in the area of climate change, especially findings made by the IPCC<sup>54</sup> may force parties to move in a different direction. This may influence the principle of sovereignty, as states have to take this in consideration.

Despite the commitment to take precautionary approach measures in Article 3, much needs to be done in persuading states on how to implement this article.<sup>55</sup> This shows the vulnerability of commitments and general principles. Nevertheless, if one looks at the commitments made in the climate regime, there is a tendency to complement definite rules with general and discretionary principles or soft law.

The obligations agreed upon in Article 3 are by all means a step in the right direction. However, the reduction of 5% compared to 1990-levels, is regarded upon by scientists to be insufficient to solve the problem of climate change. Climate change is often referred to by scientists as a creeping problem. This indicates that the consequences are hard to predict in time as well as in scale.

This problem becomes even larger with the USA and Australia standing on the sideline. In this regard it would be tempting to address the Kyoto-commitments as a delay of the problems at hand. This concern shows how strong the principle of sovereignty stands in treaty law today. However, it is well-known that international law works rather slowly.

Another interesting point is that for the first time it makes the concept of common but differentiated responsibility the explicit basis for the very different commitments of developed and developing states parties. This principle acknowledges the different capacities in solving global environmental change. This also alters the traditional view of similar obligations for all sovereign states, which after all offers balance and

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<sup>54</sup> International Panel on Climate Change.

<sup>55</sup> See Birnie & Boyle p. 119.

stabilisation between sovereign states. But perhaps even more remarkable is the different obligations between developed states. This added a fair share of extra flexibility to the negotiation process. Simultaneously it can be said to be a part of a more general trend where states recognize the inherent differences between individual states, and the consequences they have.

An interesting feature in the Kyoto Protocol is Article 18. This article can be a cause for concern. On the first meeting of the parties after it is ratified, they have to consider whether any sanctions will be legally binding for states. If this is agreed upon, a new ratifying-process has to take place. This could of course be unproblematic, but also potentially problematic scenarios can emerge from this process, for example a repetition of Russia's conduct. States Parties are anyhow agreed to have the 11<sup>th</sup> COP of the Climate Change Convention and the first session of the Conference of the Parties serving as the Meeting of the Parties (MOP) to the Kyoto Protocol in Canada from 28 November to 9 December later this year.

#### 2.2.5 Flexibility mechanisms

The Kyoto Protocol introduced three new instruments or flexibility mechanisms in the area of international environmental law; emission trading, joint implementation, and the clean development mechanism.<sup>56</sup> The reason for this was to facilitate compliance. It is likely that the practical operation of these mechanisms will raise numerous difficulties regarding international law. The main rationale for the creation of these instruments is cost-efficiency. Reductions in greenhouse gases should be achieved with the lowest possible cost. This creates an incentive for a more sound environmental policy, as the important economic factor is integrated in the process.

However, the protection of the environment and climate change has other competing goals than cost efficiency. These are for example the precautionary principle or sustainable development. These principles, amongst others, entail the possibility of delimiting the state sovereignty-sphere. These principles play a major role in the climate

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<sup>56</sup> Articles 17, 6 and 12, respectively.

regime and are binding upon states parties. Clashes between cost-efficiency and these principles of a more traditional environmental character are possible.

#### 2.2.6 Compliance Mechanisms and the Marrakesh Accords

Most international agreements focus solely on the content of the commitments rather than on the consequences for a country in breach of the commitments. And for a realistic hope of combating climate change, this had to be dealt with. At COP 7, a decision was adopted on the compliance regime for the Kyoto Protocol. This is among the most comprehensive and rigorous on the international arena. It makes up the "teeth" of the Kyoto Protocol, facilitating, promoting and enforcing adherence to the Protocol's commitments.

The compliance regime consists of a Compliance Committee made up of two branches. The facilitative branch's role is to provide advice and assistance to Parties in order to promote compliance. The second is the enforcement branch, which has the power to determine consequences for Parties not meeting their commitments. Both branches are composed of ten members, aiming to reflect states from different regions. Decisions of the Facilitative Branch need a three-quarters majority. Decisions of the Enforcement Branch require, in addition, a double majority of both Annex I and non-Annex I Parties.<sup>57</sup>

With the problem for discussion in mind, the most interesting is the Enforcement Branch. The main responsibility is determining whether an Annex I Party does not comply with its emission target or reporting requirements, or whether it's ineligible to participate in the mechanisms. The Enforcement Branch can also decide whether to adjust a Party's inventory or correct the compilation and accounting database, in the event of a dispute between a Party and the expert review team. This should contribute to a fair and accurate system which all states can rely upon.

If Annex I Parties after the expert review are in non-compliance with the emission target, they are granted 100 days to correct this. If, at the end of this period, a Party's

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<sup>57</sup> For more details see <http://unfccc.int/resource/docs/cop7/13a03.pdf#page=64>.

emissions are still greater than its given amount, it must not only make up the difference in the second commitment period, but also a penalty of 30% of its shortfall. It will also be excluded from “selling” quotas under the established emissions trading system, which may provide some improvements if the state in concern actually sells quotas. Finally, within three months, it must develop a compliance action plan detailing the action it will take to make sure that its target is met in the next commitment period.

Any Party not complying with reporting requirements must develop a similar plan, and Parties that are found not to meet the criteria for participating in the mechanisms will have their eligibility withdrawn. In all cases, they will try to make the breaching states feel uncomfortable. This is done by the Enforcement Branch which will make a public declaration that the Party is in non-compliance and what sanctions will be applied.

The Compliance Committee will base its deliberations on reports from expert review teams, the subsidiary bodies, Parties and other official sources. Competent intergovernmental and non-governmental organizations may submit relevant factual and technical information on the relevant branch. This should all in all contribute to a trustworthy measurement of a state’s status.

This compliance regime obviously sets heavy standards on the shoulders of the participating parties. And it will imply further limitations on a state’s sovereignty-sphere. It is an interesting concept, which with anticipation will improve compliance. It moves compliance regimes away from the political scene and is increasingly based on the rule of law. But this kind of regime requires treaties to have a high level of precision and accuracy to exploit its full potential.

A counter-argument and a sign of strong state sovereignty is the fact that several states have chosen not to be part of this system. Despite all the improvements compared to more traditional compliance regimes, this crucial point is hard to avoid. But after all it is merely a consequence of the traditional ordering of international law; states have the discretion to bind themselves, even within a framework context as the one mentioned above.

Anyhow, often the test of success lies in the subsequent evolution of a convention, rather than the convention itself. And concerning the UNFCCC, the subsequent evolution must be characterized as rather successful. This shows how states subsequently can be “trapped” by their initial ratification of a convention. The international pressure to follow along can prove itself to be quite forceful.

### 2.2.7 Customary law and climate change

To search for customary law within the field of climate change, the focus-area must be widened, but some focus must remain on treaties. The no harm principle established in international law can easily be said to be a foundation for the Framework Convention on Climate Change. The problem, however, is identifying the exact harm caused by states. Moreover, the global atmosphere, where the damage is caused, doesn’t literally fall under “beyond the limits of national jurisdiction”.<sup>58</sup> However, good arguments point towards that this expression should be analogous to common areas such as the high seas. This also has support in the UNGA Resolution 43/53, and in the description of climate change as a matter of common concern in the climate change convention.

Customary international law, and the responsibility of states for the fulfilment of their customary obligations, may provide some legal restraint on the production of greenhouse gases or on the conduct of other activities likely to result in global climate change. However, the road from this conclusion to a rigid set of acceptable norms of behaviour from states is long.

The interesting question is, however, to what extent customary law can impose duties on non-members of the Climate Change Convention or maybe more importantly, non-members of the Kyoto Protocol. The answer is strongly debatable, and will depend on the legal status of environmental principles such as sustainable development, the precautionary principle and the no harm principle. But also the duty to inform and impact assessment could play vital roles in this development. The problem lies mainly in drawing an exact line between what’s acceptable and what’s not. Accordingly, it will be a bit optimistic to rely on customary law to address and handle this problem. All in

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<sup>58</sup> See Principle 21 in the Stockholm Declaration.

all, a better solution must be to trust states to agree upon mutual obligations, such as the Kyoto Protocol. This will hopefully save some valuable time for the climate.

Characterization of climate change as the “common concern of mankind” is important for the development of an obligation *erga omnes* because it increases its level of seriousness on the international arena and declares climate change to be the legitimate object of international regulation and supervision. The real significance of obligations *erga omnes* would be revealed if the international community could hold individual states accountable for non-compliance with their obligations through the Conference of the Parties.<sup>59</sup> Accountability through the COP would provide a valuable and rapid instrument for insuring adherence among sovereign states.

#### 2.2.8 Climate change and the role of NGOs

An interesting interjection is the influence of non-governmental organisations (NGOs). Sovereignty is territorially based and it exists over a state’s territory. This is one of the reasons why it as a rule cannot be attributed to international organisations.

Nonetheless, a recent trend in international law is the increased participation of non-state actors, in particular NGO’s. This applies not only in the treaty negotiations process, but also in shaping subsequent developments within treaty regimes. The influence is primarily achieved through participation, e.g. the meetings of the Conference of the Parties to the Climate Change Convention and its subsidiary bodies.<sup>60</sup> Although the legal foundation for a limitation of the principle of sovereignty is thin, the trend is clear. Civil society is increasingly forcing states in certain directions by setting the agenda both on the national and the international arena. This development falls under the wider trend towards viewing international society in terms broader than a community of states.

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<sup>59</sup> See Birnie & Boyle p. 100.

<sup>60</sup> Three NGO representatives have the right to observe and to some extent participate actively.

## 2.3 The law of the sea

### 2.3.1 Introduction

The rules for the protection of the marine environment are among the most highly developed in the field of international environmental law. Some interesting developments relating to the principle of sovereignty have accordingly emerged from this process.

The third conference on the law of the sea (UNCLOS III),<sup>61</sup> tried to balance a myriad of competing interests, and the resulting compromise ultimately satisfied few. The United Nations Convention on the Law of the Sea<sup>62</sup> was opened for signature on 10 December 1982 and entered into force on 16 November 1994. Parts of the Convention are of a framework nature, which by now have been supplemented by a number of other significant conventions. Moreover, customary law plays an important role in supplementing its provisions. UNCLOS has a wide impact area, but the paper will solely focus on regulations relating to environmental protection. As a result of the Convention, the attention is no longer on responsibility or liability for environmental damage, but instead rests primarily on international regulation and co-operation in the protection of the marine environment.

### 2.3.2 Overview of key provisions

Quite paradoxically, Article 56 of the Convention resulted in a net expansion of national jurisdiction.<sup>63</sup> It formally extended the sovereign rights of coastal states to the vast new area of Exclusive Economic Zones, estimated to contain 25% of global primary production and 90% of the world's fish catch. This net expansion however, is sought compensated by other obligations. The sovereign right of coastal states in their maritime exclusive economic zones are qualified by specific obligations owed to other states and

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<sup>61</sup> Had meetings from 1974-82.

<sup>62</sup> Hereafter UNCLOS.

<sup>63</sup> A similar expansion came ten years later, the UN Convention on Biological Diversity (CBD 1992, Article 15) extended sovereign rights to the even vaster range of plant and animal genetic resources, thereby enclosing access to another major piece of what had once been considered "heritage of mankind". The corollary duties are listed in Articles 5-14.

to the international community.<sup>64</sup> Generally, sovereign rights constitute a kind of legal title weaker than state sovereignty, as they as a rule are exercised outside state territory.

The need for limitations on states' freedom of action has increasingly been recognised. International legal instruments and doctrine now often refer to the common interest of humanity,<sup>65</sup> or common concern of mankind, to identify broad concerns that could form part of international public policy. Articles 136-137 in UNCLOS use the reference to the international community as an entity or authority of collective action.<sup>66</sup> This encourages states to act as a part of a bigger entity. It contributes to a more united effort, which, as I pointed out earlier, is imperative for the protection of the global environment.

Generally, an advantage with UNCLOS is the holistic approach to marine pollution. Under section 1.4 above, I criticized international environmental law for avoiding sectoral approaches, resulting in a fragmented field of law. UNCLOS however, deals with marine pollution from ships, seabed operations, land-based sources, dumping, and atmospheric pollution.

With regard to sovereignty, explicitly, UNCLOS declares that; "states have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment". This constitutes an interesting starting-point for the balancing of economic rights of states and the protection of the environment.

Section XII of the Convention, consisting of Articles 192 to 237, establishes a general framework for global and regional cooperation on the prevention of pollution of the sea. It obliges states to monitor the marine environment, and to assess and publish the potential impacts of marine activities under their jurisdiction. It requires states to adopt laws against pollution from all the different sources. It obliges states to enforce these laws and applicable international standards, subject to certain safeguards regarding, for

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<sup>64</sup> See Articles 61-70.

<sup>65</sup> See UNCLOS Article 137 (2).

<sup>66</sup> Also see Principle 24 of the Stockholm Declaration and Principle 7 of the Rio Convention stating "states shall co-operate in a spirit of global partnership to conserve, protect, and restore the health and integrity of the Earth's ecosystem".



instance, investigation of foreign ships and rights of passage. And finally it holds states responsible for not fulfilling these obligations.

In addition to setting out the general scope of the duties on all states to protect the marine environment, the Convention sets a balance for their execution by coastal and flag states, who do not share the same interests in prescribing and enforcing pollution standards. To some extent, it moderates national jurisdiction to prescribe pollution laws by reference to “generally accepted international rules”. As to enforcement power, it is shared three ways among flag, coastal and port states, whose authority is consequently to be found not only in section XII, but also in the articles on particular marine zones elsewhere in the Convention, e.g. Territorial Sea and Exclusive Economic Zone.

The extension of jurisdiction in this relation may provide a better protection for the marine environment. When the coastal state has jurisdiction over its surrounding waters, it simultaneously makes available bodies which may enforce activities violating environmental regulations. This enforcement is also in the interest of the state, as marine pollution in their internal waters by all means is unwanted. In the Exclusive Economic Zone, the opportunity to provide a better protection for the natural resources is apparent, partly because other motivating factors than merely environmental are relevant. The establishment of an E.E.Z provides a good incentive for states to enforce marine pollution. But whether the E.E.Z prohibits harmful activities on the high-seas is a different question.

However, there is a duty to protect the environment which requires states to take all the measures consistent with UNCLOS which are necessary to prevent, reduce and control pollution of the marine environment from any source, using the best practicable means at their disposal and in accordance with their capabilities.<sup>67</sup> This duty competes with the sovereign right of states to exploit their natural resources.<sup>68</sup> The obligation described in Article 194 protects not only states and their marine environment, but also the marine environment as a whole, including the high seas.<sup>69</sup> This goes beyond the obligation laid

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<sup>67</sup> Article 194 (1).

<sup>68</sup> See Article 193.

<sup>69</sup> See Birnie & Boyle p. 352.

down by the Trail Smelter arbitration<sup>70</sup> and points out the direction towards protection of global common areas. Obviously, the best of intentions lie behind this obligation. However, it has been shown to be inadequate. There is a need for regulatory measures which go beyond the highly vague obligation to “prevent, reduce and control pollution.”

Article 204 of the Convention establishes an obligation to make environmental impact assessments. It provides that states should “observe, measure, evaluate and analyse by recognized scientific methods, the risks or effects of pollution on the marine environment” and in particular “shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment”. Article 206 regulates when states have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of, or significant and harmful changes to, the marine environment; “they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of such assessments”.

As a comparison with the EU, the directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment can be mentioned.<sup>71</sup> It provides that member states shall adopt all necessary measures to ensure that, before consent is given to projects likely to have significant effects on the environment, an assessment is made with regard to their effects.

### 2.3.3 Dispute settlement

The entry into force of UNCLOS in 1994 was particularly significant in terms of the settlement of disputes concerning the law of the sea. The Convention is special in providing for compulsory settlement of disputes by recourse to the ICJ, or the International Tribunal for the Law of the Sea,<sup>72</sup> or to conciliation, arbitration or special arbitration. One of these mechanisms is applicable to almost all disputes relating to the law of the sea. Section XV of the Convention stipulates that in case of a dispute

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<sup>70</sup> See below under 3.3.

<sup>71</sup> This is often referred to as the SEA-directive, or the Strategic Environmental Assessment directive.

<sup>72</sup> Hereafter ITLOS.

between two states, the parties are to proceed “expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means”. As a consequence, a state that has acceded to the Convention and that finds itself involved in a dispute under the Convention must submit the conflict to compulsory dispute settlement.

In the realm of international law this is quite extraordinary. As I mentioned earlier, as a rule, there is no judicial power guarding international law. There are not many exceptions to this starting-point, and the law of the sea is an area of importance. Concerning sovereign states, this certainly should improve the compliance of the obligations undertaken. For the marine environment, this has already had its impact. It could also be a catalyst for developing an autonomous and dynamic area of international law, similar to the development seen in the area of human rights.

Regarding the ITLOS, it is to have jurisdiction over deep seabed mining disputes, including disputes between the states parties and the Seabed Disputes Authority.<sup>73</sup> The creation of the ITLOS could turn out to have several implications. States parties may refer to the Tribunal disputes not only concerning the international seabed area and the mining of metallic nodules. The Tribunal may also be called upon to decide disputes in areas such as navigation, fishing, and access to the sea or maritime boundaries.

The Tribunal has already delivered some interesting decisions. In the Mox Plant case, Ireland challenged the legality of a new nuclear plant manufacturing mixed oxide fuel (MOX) near Sellafield in the United Kingdom.<sup>74</sup>

The Tribunal noted that, in accordance with Article 290 paragraph 5, of the Convention, it may prescribe provisional measures if it considers that the urgency of the situation requires it. In the circumstances of this case, the Tribunal found that the urgency of the situation did not require the prescription of the provisional measures as requested by Ireland, in the short period before the constitution of the Annex VII arbitral tribunal.

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<sup>73</sup> Article 187.

<sup>74</sup> ITLOS Order, 3 December 2001, 41 ILM 405 (2002).

Ireland brought the case against United Kingdom before the Tribunal, on the grounds of Article 206 of UNCLOS, especially by the authorisation of the plant on the basis of a 1993 Environment Impact Statement. This statement failed to assess the potential effects on the marine environment of the Irish Sea.<sup>75</sup> Ireland also claimed that the United Kingdom had failed to co-operate as required by Articles 123 and 197 of UNCLOS, e.g. by withholding environmental information requested by Ireland.<sup>76</sup>

The court declined Irelands request to suspend the operation of the plant. However, the Tribunal considered in its Provisional Measures Order that:

“the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention. And under general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under Article 290 of the Convention.”

In the view of the Tribunal, prudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant, and in devising ways to deal with them, as appropriate.

For these reasons, the Tribunal prescribed the following provisional measure, pending a decision by the Annex VII arbitral tribunal, Ireland and the United Kingdom shall cooperate and shall, for this purpose, enter into consultations forthwith in order to: firstly exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant; secondly to monitor risks or the effects of the operation of the MOX plant for the Irish Sea; and thirdly devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.<sup>77</sup>

The Tribunal further decided that, in accordance with Article 95, paragraph 1 of the Rules of the Tribunal, Ireland and the United Kingdom shall each submit an initial report on compliance with the provisional measure prescribed not later than 17 December

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<sup>75</sup> See P. Sands (2003), pp. 806-807.

<sup>76</sup> Application, 25 October 2001, para. 33.

<sup>77</sup> See Provisional Measures Order, 3 December 2001, para. 83.

2001. It also authorized the President of the Tribunal to request such further reports and information as he may consider appropriate after that date.

Here the Tribunal seems to link the precautionary principle to the principle of co-operation. Judge Wolfrom shows that the principle is part of the OSPAR Convention and, therefore, can be applied. But as Judge Wolfrom stated “it is still a matter of discussion whether the precautionary principle has become a part of international customary law.”

However, in this case, the tribunal could not rely on the precautionary principle as the parties had requested provisional measures. This would have meant that the Tribunal had to assess the potential impact of the plant on the marine environment of the Irish Sea. Nevertheless, the case is interesting for a variety of reasons; its emphasis on principles may prove itself as quite important for the further development in this area. In this case environmental issues accompanied with the rule of law made a practical impact on the way United Kingdom have dealt with the MOX plant. This shows the possible impact such cases may have in influencing states.

#### 2.3.4 The OSPAR Convention and London Convention on dumping

UNCLOS establishes a framework for the further development of rules on substantive matters at the global and regional levels. The OSPAR Convention<sup>78</sup> represented a new approach to the protection of the marine environment as it seeks to regulate all sources of marine pollution in a single instrument. It has influenced international environmental law as it introduced new principles, substantive rules and interesting institutional arrangements.

The Convention establishes a Secretariat and a Commission. The Commission can determine legally binding decisions and non-binding recommendations. OSPAR opens for binding decisions with only a  $\frac{3}{4}$  majority. This provides a more dynamic and flexible decision-making, as opposed to traditional bodies requiring full consensus.

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<sup>78</sup> Convention for The Protection of the Marine Environment of the North East Atlantic, signed in Paris, 22 September 1992, in force 25 March 1998.

Decisions become binding upon states which have voted in favour of the proposal, with an important exception in Article 13. Here, states can reserve themselves within the given time-limit. This entails that each state has, at least judicially, the right to individually decline any unwanted obligations. What the political pressure may constitute is a different question.

Regarding principles, the OSPAR Convention lays the foundation for the application of the precautionary principle and the polluter pays principle. At the same time it uses the instruments of best available techniques (BAT) and best environmental practice (BEP), including clean technology. The precautionary principle is stated in Article 2 (2) (a). It is noticeable here that the wording refers to threat rather than damage, and that these threats do not necessarily have to be serious. The precautionary principle has played a vital role in relation to dumping, by creating a rule where the dumping state has the burden of proof that its action doesn't harm the marine environment as well as the non-existence of alternatives to depositing on land.<sup>79</sup>

The fact that it is a regional treaty, covering the North-East Atlantic, may also entail extra pressure as states are answerable in a different manner compared to a global setting. It may also be easier to come to an agreement as it concerns similar and fewer states. Once again, states have a last resort in case of unwanted obligations; here the principle of sovereignty comes in quite heavily.

Compared to the OSPAR Convention, the London Convention has a global character, being one of the oldest global conventions on the protection of the marine environment. Its main goal is to promote the effective control of all sources of marine pollution and to take all practicable steps to prevent pollution of the sea by dumping of wastes and other matter.

In 1996, the London Protocol was agreed to further modernize the Convention and, eventually, replace it.<sup>80</sup> Under the Protocol all dumping is prohibited, except for possibly acceptable wastes on the so-called "reverse list". "Dumping" has been defined

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<sup>79</sup> See Ulfstein, Bugge, Fauchald and Sand, "Folkerettslige rammer for norsk miljøpolitikk", p. 85.

<sup>80</sup> 21 are currently Parties, 5 more is needed for it to enter into force. Most likely this will happen in 2005.

as the deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures, as well as the deliberate disposal of these vessels or platforms themselves.<sup>81</sup>

An interesting connection between UNCLOS and the London Convention should be mentioned. In Article 210 of the UNCLOS, all states parties are legally bound to adopt laws and regulations and take other measures to control pollution by dumping, and they must be no less effective than the global rules and standards, i.e. those of the London Convention. They will also be obliged to enforce such laws and regulations in accordance with Article 216 of UNCLOS. This is an important consequence in view of the fact that the London Convention currently has 80 Parties, while the UNCLOS has 148 Parties.

### 2.3.5 Customary law and UNCLOS

The interesting question is whether there exists a duty in customary law to protect the marine environment or not. It is especially interesting whether Section 7 of UNCLOS can be viewed as customary international law. Conventions which pull in the same direction are for instance the 1972 London Dumping Convention and the 1973/8 MARPOL Convention,<sup>82</sup> and a selection of regional treaties.<sup>83</sup> The grade of acceptance for UNCLOS, as well as similar conventions, establishes great support for *opinio juris* and represents an agreed codification of existing principles which have become part of customary law.<sup>84</sup> Indeed the Convention itself refers to this body of international law in several articles where it calls on states to comply with “generally accepted international rules and standards.” See, for example, Article 211 (2). But again, the question arises whether it really contributes to the protection of the environment and how it influences the principle of sovereignty.

On the other hand Section XII of UNCLOS is almost entirely new law when compared to the four 1958 Geneva Conventions.<sup>85</sup> The argument made above is not free of

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<sup>81</sup> See [www.londonconvention.org](http://www.londonconvention.org).

<sup>82</sup> International Convention for the Prevention of Pollution by Ships (MARPOL) (London).

<sup>83</sup> See for example my discussion on the OSPAR convention, section 2.3.4.

<sup>84</sup> See Birnie & Boyle p. 352.

<sup>85</sup> See table of cases.

controversy and it is certainly open for states to argue that Section XII cannot be invoked against them until they ratify the Convention.

However, new relevant customary law can be said to influence the principle of sovereignty as it implies new rights or obligations for states. States themselves must still play their role in creating the custom, but not every state has to agree.<sup>86</sup>

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<sup>86</sup> States may as a last resort, however, avoid new customary law through the persistent objector rule. But the likelihood of a successful claim of this rule, for a state in this area, is rather improbable.



### 3 Case law relating to sovereignty

#### 3.1 Introduction

Environmental law hasn't naturally been a part of international lawyers' projects.<sup>87</sup> However, several decisions of international courts and tribunals can give a lead in interpreting the meaning and implications of the principle of sovereignty related to environmental problems.

#### 3.2 Island of Palmas and Corfu Channel cases

One of the first cases of interest was the *Arbitral Island of Palmas*<sup>88</sup> case. The interesting passage in the case is:

“Territorial sovereignty involves the exclusive right to display the activities of a State. This right has a corollary duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war together with the rights which each State may claim for its nationals in foreign territory.”

This principle sought to keep a balance between states, Judge Huber implies that all states have a duty to respect other states territory. This forms the basis for the principle of sovereignties' positive and negative aspects.

In the *Corfu Channel* case, Albania was held responsible for damage to British warships by not warning them of mines in Albanian internal waters. ICJ stated that “every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.<sup>89</sup> This could be interpreted as a duty to warn other states of known dangers, including environmental hazards.

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<sup>87</sup> See Ole Spiermann, “Moderne Folkeret” (1999). Here he separates the contributions to international law between heads of states and international lawyers, and heads of states may be said to have been dominant in the development in international environmental law.

<sup>88</sup> *Island of Palmas Case* 2 RIAA 1928.

<sup>89</sup> *Corfu Channel Case*, ICJ Reports (1949).

### 3.3 Trail Smelter arbitration and Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons case

Probably the most classic case where an environmental issue was solved is the Trail Smelter Arbitration between Canada and USA. The case concerned a Canadian zinc and lead smelter on the US border. This activity led to sulphur emissions which harmed the neighbouring forest in the USA. The Tribunal concluded more generally, in what constitutes its best known paragraph:

“under the principles of international law... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”

The important addition, compared to the two above mentioned cases, was that transboundary pollution was now one of the duties a territorial state, in consideration of other states, must take into account when administering its territory.

The Trail Smelter case however has its clear limitations, namely far-reaching and unquestionable environmental pollution, where; “the case is of serious consequence and the injury is established by clear and convincing evidence”. As a result, its principles apply more to pollution among neighbouring states than to global environmental pollution. The protecting consideration is mainly the neighbouring state, not the environment. If the pollution doesn’t affect any other state, the principle isn’t applicable.

Regarding the status of the principle laid down in Trail Smelter as a rule of customary international law, a lot points to a customary foundation.<sup>90</sup> It seems to have rather wide-spread basis and support.

However, if you look at the widespread effects of transboundary pollution since the Trail Smelter case, it muddies the water a bit. There are numerous cases where a breach of the principle has gone uncontested in international law. The Chernobyl-accident automatically springs to mind, where there were no consequences for the Soviet Union

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<sup>90</sup> See e.g. the discussion by Ruud, Ulfstein, Fauchald, ”Utvalgte emner i folkerett”, pp. 82-87.

or its successors. Transboundary pollution from Germany can be said to have damaged Norwegian fishing lakes, also without consequences. The reason for this could possibly be found elsewhere, outside customary law. It could be a reflection of the general lack of interest by states to directly and through legal instruments confront the polluting state. Often such cases are pursued through other channels than the strictly legal, for instance on the political level. This is probably why it is important to establish mechanisms which entail liability to these activities on behalf of the international community.

In the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ recalled: “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”<sup>91</sup> With this in mind, the court went further and said: “The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”<sup>92</sup> The addition to Trail Smelter is that transboundary pollution now applies not only to states but also to areas outside national control, e.g. the high seas. This constitutes a clear limitation on the right to pollute for sovereign states.

However it must be said that the principle of sovereignty is still the ruling principle concerning pollution, as pollution which doesn't cross borders will fall outside the rules mentioned above. This is the kind of pollution causing for instance the climate change, which is why there has been an urgent need for treaty regulations rather than relying on the development of customary law

### 3.4 Gabčíkovo-Nagymaros Dam Case

In the Gabčíkovo-Nagymaros Dam Case, the ICJ again stressed the importance of the environment.<sup>93</sup> One of the important issues was how to interpret treaties dating from times of less environmental awareness.

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<sup>91</sup> Advisory Opinions on The Legality of the Use by a State of Nuclear Weapons in Armed conflict, ICJ Reports 1996, para. 29.

<sup>92</sup> Ibid. This passage was cited and embraced in the Gabčíkovo-Nagymaros Case.

<sup>93</sup> Gabčíkovo-Nagymaros Dam Case ICJ Rep. (1997).

“Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”

This passage cannot be taken as a proof of customary law on a wide range of environmental principles under sustainable development. The passage is taken from the Court’s considerations on the status of a legally binding treaty on building the dam, when the treaty was set aside and could hardly be fulfilled. The Court held that the decisive point “is that the factual situation as it has developed ... shall be placed within the context of the preserved and developing treaty relationship”. The interesting point here is the important role the Court found for environmental considerations in this developing treaty relationship. A treaty must accordingly be interpreted and applied in the light of customary international environmental law.

This could ultimately affect the principle of sovereignty, by adding environmental issues to an already existing treaty. By doing this, one adds a substance to the treaty which the sovereign states might not have agreed upon. The consequence of this is not easy to predict. However, in the *Gabcikovo*-case, the Court underlined that it was up to the parties to find an agreed solution. Finally, the case also takes account of the objectives of the Treaty as well as the norms of international environmental law.<sup>94</sup>

Also in the case, Hungary argued that it was becoming increasingly clear that the construction of a system of dams and locks in the Danube River would have a severe impact on the environment. Since the ratification of the treaty in which both countries agreed to construct the dams in 1977, the precautionary principle according to Hungary had evolved into an *erga omnes* obligation. The Court, however, in 1997 found that Hungary could not rely upon a fundamental change in circumstances, as the developments in environmental law were not completely unforeseen.

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<sup>94</sup> Ibid. para. 141.

Finally, in his separate opinion, Judge Weeramantry referred to “principle of trusteeship for earth resources”. This is a relative new concept in international law which establishes a collective trusteeship for the integrity of the global environment and common areas such as the oceans, atmosphere and outer space. This may address the global dimensions of environmental protection in a new way, and is an emerging concept in international law.<sup>95</sup>

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<sup>95</sup> See Peter H. Sand and the article “Global Environmental Change and the Nation State: Perspectives of International Law”.

## **4 State responsibility - State liability for environmental damage**

### **4.1 Introduction**

State responsibility may be viewed as a way for international law to add some “teeth” to its rules in general. State responsibility adds means for ensuring enforcement, compliance and settlement of disputes to international environmental law. The reason why state responsibility is addressed here is the way it adds an interesting perspective on the principle of sovereignty. Much of the emphasis in the following will be on discussing whether state responsibility is the right path to follow for ensuring compliance for global environmental problems. I will start with a short presentation on the substantive rules.

### **4.2 An outline on state responsibility and the environment**

Responsibility through environmental damage is one area of state responsibility. The category state responsibility covers the field of responsibility of states for internationally wrongful conduct, in general. The rules are set out in the ILC's Articles on the Responsibility of States for Wrongful Acts (2001).<sup>96</sup> It is a product of more than forty years' work by the ILC on the topic,<sup>97</sup> and they involve both codification and progressive development.

The idea is that states can be held accountable for breaches of international law. The breach could be of an international legal obligation established by a treaty or by customary international law, or possibly under general principles of international law. This was highlighted in the Rainbow-Warrior arbitration, where French agents sank the vessel Rainbow Warrior at port in New Zealand; “... any violation of a state of any

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<sup>96</sup> Report of the ILC, UN Doc. A/56/10 (2001).

<sup>97</sup> This may have caused that some of its relevance has diminished or diverted through time.

obligation, of whatever origin gives rise to state responsibility.”<sup>98</sup> This enables the victim-state to have a claim against the violating state. A state responsible for an internationally wrongful act is under the obligation to cease the act, and to offer appropriate assurances and guarantees of non repetition if the circumstances so require, and finally to make full reparation for the injury caused by the wrongful act. The victim-state can channel its case through diplomatic action or through international mechanisms where such are in place with regard to the subject matter at issue, alternately refer the dispute to the ICJ or to international arbitration, if the needed jurisdictional basis has been established. A good example of this latter approach in the environmental context is the Gabčíkovo-case.

The liability rules for environmental damage are still evolving and in need of further development. Environmental damage here refers to damage to the environment as defined above under section 1.3.2. Perhaps the most applicable obligation concerning state responsibility is the one requiring states to prevent particular environmental harm, or to refrain from activities which could lead to environmental damage. The criteria of “significant harm” would naturally be a subject of dispute. I will not, however, pursue this question any further here. Other relevant substantive obligations could be procedural requirements, such as the right of access to information and the duty to carry out an environmental impact assessment. But as mentioned above, state responsibility and liability entails *prima facie* all environmental obligations.

#### 4.3 State responsibility and UNCLOS and Climate Change

UNCLOS contains two rules on state liability for damage. States parties and international organizations have under Article 139 the responsibility to ensure that activities in the Area<sup>99</sup> comply with the UNCLOS rules on the Area. And Article 139 (2) says that “damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability.” However, a state may argue that it has taken all necessary and appropriate measures to secure effective compliance with the related provision. At the same time, states have a

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<sup>98</sup> Rainbow Warrior (France vs New Zealand), (1990) 20 RIAA 217 para. 75. See also the Chorzow Factory case, PCIJ, Series A, no. 17, 1928 p. 29.

<sup>99</sup> I.e. the seabed and ocean floor and subsoil beyond the limits of national jurisdiction.

duty to ensure that international organizations of which they are members, implement their responsibilities under Article 139.

The second relevant rule is Article 235 where states are; “responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.” The technique used is incorporating the already existing rules on state liability into UNCLOS. And consequently, the Article doesn’t produce a new rule of liability for damage to the marine environment in this regard.

The UNFCCC doesn’t include an explicit rule on liability for states which harm the environment. Some countries, however, wanted to include a provision that the Convention did not prejudice the rules of international law concerning state responsibility and liability.<sup>100</sup> The closest one gets to responsibility is the duty for developed countries parties to “assist the developing countries parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adoption to those adverse effects.”

#### 4.4 State responsibility and global environmental problems

As pointed out above under the law of the sea, the international community increasingly tries to focus on preventing environmental damages through co-operation rather than damage-control through responsibility. This trend is conspicuous, and encapsulates the climate change as well. Traditionally, a state would only be responsible for damage caused where it could clearly be demonstrated that this resulted from its own unlawful activity. This has proved to be an inadequate construction for dealing with environmental issues for a variety of reasons. The difficulties of proof are one major obstacle, in many cases it is simply impossible to prove that particular damage has been caused by one specific source. Other obstacles are liability for lawful activities and the particular question of responsibility of non-state offenders.

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<sup>100</sup> P. Sands p. 900.



Accordingly, the international community has slowly been moving away from the classic state responsibility approach to damage caused towards a regime of international co-operation. This bi-lateral focus cannot really come to terms with the fact that the protection of the environment is truly a global problem which calls for a global response. State responsibility can arguably be viewed as maintaining sovereignty and strong states, and responsibility being the only means of regulating the interaction or problems between states. There is however a clear tendency in international environmental law today towards a more positive view for alternative mechanisms, illustrating the development in international environmental law.

On the other hand, the possibility of state responsibility providing an incentive to encourage compliance with environmental obligations cannot entirely be dismissed. It may serve as an important catalyst to impose sanctions or to require corrective measures restoring the given harm. It can contribute to a tighter international law, by adding more pressure on states. The possibility of knowing the existence of mechanisms to which all states may be held liable, could have positive side effects. Another argument is that international law to a small extent has established mechanisms to control and enforce existing obligations between countries. The control with multilateral environmental agreements today is largely based on a reporting-system where each state reports on how it is doing. This can be characterized as setting the fox to keep the geese. As a result the trend is to develop mechanisms to deal with this concern, either through soft enforcement or hard enforcement.<sup>101</sup> Finally it may be seen as a catalyst for an implementation of the polluter-pays principle, by internalising environmental costs into production processes.

Arguably, state responsibility provides very little prevention as to prohibit another state from conducting activities within its territory that might pose a risk of damage to the victim state. The Nuclear Tests Cases, where Australia and New Zealand complained about French nuclear weapon tests in the Pacific, supports this statement.<sup>102</sup> Judge Ignacia-Pinto stated that reparations could be required for actual damage suffered, but that there were no means available whereby states concerned about potential nuclear

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<sup>101</sup> See for example the Marrakesh Accords.

<sup>102</sup> ICJ Rep. 1974.

fallout could legally prohibit another state from using its territory in ways exposing them to the future likelihood of nuclear fallout. This affirms, even today, the inadequacy of international environmental law in preventing other states' potentially harmful conduct, especially conduct harming the global environment such as global warming or pollution of the high seas.

## 5 Principles of international environmental law and state sovereignty

### 5.1 Introduction

It is not possible to draw any general conclusions on the legal status of international environmental legal principles. There is, however, an emerging emphasis on principles in international environmental law. And this emerging concept has to be taken into consideration by all states. Ultimately, this leads to an influence on the principle of sovereignty. A number of principles have the status of hard law through codification in treaties.<sup>103</sup> Others are at rest in the soft law phase.<sup>104</sup> As more principles reach the phase of hard law, either through binding treaties or customary law, the principle of sovereignty will clearly be influenced.

The problem however, is what role principles can and will play. No principal judgment on the character of principles can be found in international case law.<sup>105</sup> Some of the principles are highly abstract, and this causes difficulties in finding a clear and practical scope. This again causes difficulties in applying it.

### 5.2 Sustainable development and principles in UNFCCC and the UNCLOS

In the field of international environmental law, sustainable development has played a major part since it was launched in 1987 in the report of the Brundtland Commission “Our Common Future”. Sustainable development imposes restraints on developmental activities if these undermine the environmental basis for further development in the long run. This concept is by many reckoned to reach the status of *ius cogens*, a peremptory norm of international law. Despite all the positive sides accompanying such a promotion, it has some major concerns as well. All norms of such character may

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<sup>103</sup> See e.g. the principle of co-operation in the Climate Change Convention Article 3(5).

<sup>104</sup> This applies to almost every international environmental principle without a treaty accompanying.

<sup>105</sup> See Verschuuren, “Principles of Environmental Law”, p. 13.

anyhow “drown” in the limitations of international law itself. Especially by the lack of an authoritative third-party, competing claims and interpretations by states make potential problems hard to resolve. The extensive linkage to sustainable development is thus increasingly being criticised. “its [sustainable development] reach is so broad and its hope is so great that it disintegrates when examined closely.”<sup>106</sup> The point made is understandable. For principles to impose duties on states, and thus influence sovereignty, the need for unambiguous principles is imperative.

Article 3 in UNFCCC underlines the principles guiding the parties in their efforts to achieve the objective of Article 2. The principles listed in Article 3 reflect the contours of global environmental responsibility elaborated in the Rio Declaration and Agenda 21. It includes reference to inter-generational equity, common but differentiated responsibility, the precautionary principle and sustainable development. The use of these principles is meant as guidance for later negotiations, and can hardly be interpreted as binding, even upon states parties. Support for this interpretation can be found in the article itself, which contains the word “should”. This pulls in the direction of states remaining sovereign. An interesting question is what the legal effect of acts disregarding the principles contained in Article 3 would be. At least the principles are relevant when interpreting and implementing the Convention. It also has to be taken into account in good faith in the further negotiations.

As mentioned above, Article 3 lists principles intended to guide the parties “in their actions to achieve the objective of the Convention and to implement its provisions”. There is a pattern in modern treaty-making to put principles in the operative part of a convention. This has been contested by many states, e.g. USA’s protest on incorporating principles in the above stated Article 3. And the reason for the protest is obviously the fear of being bound by something the state expressly hasn’t consented to. The legal implication of the principles will arguably be enhanced in the future by being in the text rather than in the preamble.

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<sup>106</sup> Michael McCloskey, “The Emperor has No Clothes: The Conundrum of Sustainable Development”, Duke Environmental Law & Policy Forum (Vol. 9) 1999, p. 157.

The precautionary principle, as stated in UNCLOS came up in the Southern Bluefin Tuna case<sup>107</sup> before the ITLOS. The migratory species had dropped to a record low and New Zealand and Australia claimed that Japan failed to meet the precautionary principle as laid down in the Convention. The precautionary principle is mentioned various places in the text, but it does not appear explicitly in the provisions on the preservation of living resources and migratory species, which was the case here.<sup>108</sup> Still, the tribunal seemed to interpret the case in the light of the precautionary principle. The tribunal held that, in the case of scientific uncertainty as to the status of the southern bluefin tuna stock, “the parties should act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna”.<sup>109</sup>

It may be only a matter of time before the majority of the Tribunal endorses the principle’s status as a norm of customary international law.

### 5.3 Potential developments

Whether principles will play an increasingly important role in international environmental law is an open question. International environmental regulations have traditionally been dominated by heads of state rather than international lawyers.<sup>110</sup> However, the use of judges for settlement of disputes is an increasing phenomenon in international environmental law, and judges are in general used to applying principles. In e.g. the Gabcikovo-case this combination was evident. This could possibly divert some power from states since they normally strive to comply with the rule of law. This process is also harder for each state to influence and shape.

Although environmental legal principles have the longest history in the field of international law, the question regarding the consequences of the difference between principles and rules for real cases has never been addressed in much detail by

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<sup>107</sup> Southern Bluefin Tuna cases (New Zealand vs Japan; Australia v. Japan), Provisional Measures. Cases nos. 3 and 4 in 1999. Also see [www.itlos.org](http://www.itlos.org).

<sup>108</sup> See Articles 64 and 116-119.

<sup>109</sup> Ibid., para. 77.

<sup>110</sup> Supra, n. 80.

international courts and tribunals.<sup>111</sup> Thus can it be argued that principles have an unrevealed potential in influencing case-law. It has however, as seen above, played a minor role in some cases.

The principle of common heritage or global heritage, the principle of sustainable development, the principle of common but differentiated responsibilities, the precautionary and polluter pays principle have all largely been created in response to global environmental problems. These are now being seen in treaties, emerging customary law and judicial decisions on the international arena. This can only be interpreted as a sign of a gradual and interesting development which slowly challenges the sovereignty sphere. And this is done by putting restraints on states' freedom through principles.

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<sup>111</sup> See Verschuuren, "Principles of environmental law", p. 13.

## **6 Conclusion and reflections**

### **6.1 Introduction**

Firstly, it must be pointed out that international environmental law, in particular the last three decades, has made a rather wide impact on international law. There have been significant changes to specific regimes and to the institutions of international law. There has been a considerable change in the principles, topics, scope and sophistication of environmental conventions. Also, non-state actors play a more active role, thereby influencing the position of states.

### **6.2 Sovereignty and the climate regime**

As a preliminary conclusion it can be argued that the role of state sovereignty is not threatened by the climate regime. However, compared to the traditional understanding of the principle, state sovereignty has certainly become more relative. The starting point is that states have full power to decide which international agreements they will commit to. And in this regard, little change can be found.

On the other hand, states are still bound by international law. They are continuously obliged by the existing rules on the international arena. This implies that states can't turn their back on international environmental regulation. As this area increases rapidly, states don't have the full power to determine their own environmental protection. General principles of international environmental law increase this area as well, evidently influencing the sovereignty-sphere of states.

The climate regime has undoubtedly seen a rapid development over the last few decades. The paradox however, is that substantial progress on the emissions themselves is still long in coming. After all, reducing emissions is what this is all about. This illustrates the lack of ability to establish rapid and effective instruments to handle global environmental problems in international law.

Certainly, the Climate Change Convention puts rather heavy restraints on states' actions. This is especially apparent now that the Kyoto Protocol is in force, as well as highly developed compliance regimes. Future decisions from the Conference of the Parties will probably also increasingly play important roles in setting preconditions for states, since a good foundation is now in place.

### 6.3 Sovereignty and the law of the sea

The oceans cover five-sevenths of the earth's surface, and its global environmental importance lies therein. The oceans are accordingly being recognised as a fragile environment which must be managed in an integrated fashion through co-operation from all states. The rules that guide states in their conduct regarding the oceans can only be derived from analysis of the full range of relevant international instruments and general international law. Despite the need for even stronger protection for the marine environment, it can be said that UNCLOS has been a unifying element for the international community.

Similar considerations as those made under the conclusions drawn under climate change above, can also be made under the law of the sea. The law of the sea however, is an older regime in international law. It also alters the Climate Change Convention by primarily regulating outside a framework approach. The law of the sea has seen developments in the direction of increased regional co-operation. Customary law has also played an important role in the further protection of the marine environment.

UNCLOS clarifies many questions relating to state sovereignty, by establishing sovereign rights and commitments concerning the marine environment. In this regard it functions as an important stabiliser for the marine administration among sovereign states. The concept of E.E.Z has attracted important attention from almost all coastal states to their adjacent seas, and has accordingly encouraged those states to consider the structure and function of their ocean administration.



There is no global environmental body with competence over environmental matters analogous to the dispute settlement body of the ITLOS. This is one of the most interesting features in UNCLOS relating to state sovereignty. The compulsory dispute settlement mechanism has created a good foundation for increased compliance and has been a welcoming addition to more traditional international dispute settlement regimes. It may develop into an important catalyst for the development of the protection of the marine environment.

#### 6.4 General reflections

The current system for the protection of the global environment is largely based upon the co-operation between sovereign states. Efforts have, however, been made to create supranational institutions in the environmental field, and it remains to be seen whether this trend will continue. Environmental issues affect a wide-range of pressing interests for all sovereign states, inevitably giving states an incentive in the direction of comprehensive self-determination.

It could be discussed whether synergetic effects have taken place. Such effects imply a major influence caused by many minor, but not insignificant, contributions. It is certainly hard to point out one source which noticeably confines the traditional concept of sovereignty. If you lay down a strict interpretation of the principle of sovereignty, it can hardly be said to have been dramatically changed by global environmental problems. But if you add all the different influential forces together, the sovereignty-sphere is obviously decreasing. Especially since states increasingly have numerous obligations in the area of international environment law, their room for action is clearly limited.

It must however be stressed that the nature and scope of state sovereignty are undergoing changes. Concepts such as intergenerational equity, sustainable development and common concern of mankind all give a hint as to the existence of certain limitations on state sovereignty. These concepts are now establishing a platform for limiting a state's freedom for the sake of the larger community. In this regard, the principle of sovereignty is no longer only a foundation for exclusion and individualism, but a legal basis for commitments to co-operate at this higher level.

Most changes in international law are gradual and time-consuming. The trend is conspicuous, and it points in the direction of less freedom for states. This implies that environmental regimes, increasingly, will enjoy a greater degree of autonomy from the policies of states.

The field of international environmental law is predominantly formed by the political leaders of the world. They haven't provided for an international instrument of global application with the purpose of clarifying the general rights and obligations of sovereign states on environmental matters. No equivalent to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights has been founded. And the likelihood of one arriving soon is diminutive. Any effort to identify general principles and rules of international environmental law must necessarily be based on a consideration of state practice, including the adoption and implementation of treaties and other international legal acts, as well as the decisions of international courts and tribunals. This implies that the legal obligations for each state are highly individually determined.

As implied, a traditional interpretation of sovereignty is still apparent in the negotiations of environmental issues. In accordance with the prevailing interpretation of the principle of sovereignty – leaving states free to reject or to agree to treaty obligations, to adhere to international organisations, or to submit conflicts to international tribunal – no state is required to make explicitly defined commitments. At the same time however, the structures of MEAs today are proving themselves more capable of solving environmental problems than ever before, e.g. climate change and pollution of the marine environment. This leads to the question whether our global environmental problems can be dealt with within the frame of the principle of sovereignty. As long as the political will to handle these problems is in place, I doubt the principle of sovereignty will stand in its way.<sup>112</sup> But then again, the time taken creating the necessary political will can prove costly.

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<sup>112</sup> Compared to e.g. the WTO, where states have agreed to limit their sovereignty for the profits they expect to obtain from being part of the agreement. The lack of such economic incentives may, despite the obvious need, hinder the political will to develop similar regimes through MEAs.

An interesting perspective is to see to what extent sovereignty influences environmental law in a wider perspective. Is sovereignty to blame for the lack of international environmental protection? The legal aspect through sovereignty is only one way to see or explain our current situation. Social, economic and political dimensions also set the agenda for global environmental regulation. Instability around the world due to poverty, overpopulation, lack of human rights and inequities in the international community, all hinder environmental protection. This instability creates a tension between economic development, environment and sovereignty. At the end of the day, governments will try to raise the social wellbeing of their people and to eradicate poverty, as Gandhi put it; “even God does not dare to appear in front of the hungry person in any form other than food”.

This paper has drawn to attention a series of not inconsiderable developments in the principle of sovereignty. And the probability of further development appears a good deal brighter than the probability of any decline of sovereign states or any movement beyond the state system.

International law, like national law, responds to different demands in society. When regulation is demanded, international community has a way to respond. And in this regard it could be argued that sovereignty has adopted itself well to new conditions. But global environmental degradation will increasingly make an impact on international law, if it proves necessary, and international law will have to respond to the challenges accordingly.

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